

**Before the  
Federal Communications Commission  
Washington DC 20554**

**In the Matter of:**

Request for Remand, Review of Administrator's	)	
Decision and/or Petition for Waiver of FCC Rules -	)	Administrator's decision June 15, 2011
Donna Independent School District	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	

**Supplementary Information**

On August 12, 2011, Donna ISD filed a Request for Review, Remand or Waiver with the FCC under the title "Request for Remand, Review of Administrator's Decision and/or Petition for Waiver of FCC Rules - Donna Independent School District (Administrator's decision June 15, 2011)<sup>1</sup>." In that Request we noted that the Administrator (USAC) had commenced COMAD proceedings based on a determination that Donna ISD had not complied with Texas State and local procurement rules, basing their decision on a Texas Education Agency (TEA) report of July 2007 and noting in their decision that:

*"During an audit, it was determined that you did not comply with Texas State Government Code 2157.0611 that required the evaluation of three bids for purchases exceeding \$2,000, or documentation explaining why three bids could not be obtained. Since you failed to follow the applicable state procurement rules, the approved SPIN change is deemed invalid."*

Donna ISD appealed the Administrator's COMAD decision, citing the fact our legal counsel believed that the Texas State Government Code 2157.0611 did not apply to local government agencies (independent school districts like Donna ISD) making the rationale for the COMAD invalid, and requested a formal Opinion from the Texas State Attorney General on the applicability of the statute to Donna ISD (and other independent school districts). It was and is Donna ISD's contention that should the Texas AG opine that the statute was/is not legally applicable to Donna ISD as a local government entity, the basis for the TEA "concern" and the Administrator's COMADs would become invalid and moot. Unfortunately, the Administrator did not wait for the Decision of the Texas AG but denied the appeal without knowing the outcome of the request for Opinion, causing Donna ISD to appeal to the FCC in this case.

On December 22, 2011, the Texas AG published their Opinion No. GA-0900<sup>2</sup> which concluded in "Summary" that:

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<sup>1</sup> Attachment 1 - Donna ISD "Request for Review, Remand or Waiver of Administrator's Decision" filed 8/12/ 2011

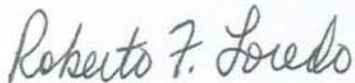
<sup>2</sup> Attachment 2 - Texas AG Opinion No. GA-0900 of December 22, 2011

*"The provision for catalog purchases in section 2157.0611 of the Government Code, to the extent that it is currently in effect, does not apply to purchases by an independent school district."*

This Opinion clearly indicates that Government Code 2157.0611 does not apply to independent school districts such as Donna ISD and, as we stated in our appeal to the Administrator and the FCC, that the basis of the TEA "concern" is invalid and accordingly, the Administrator's COMAD decision was made in error. Donna ISD could not have violated state procurement rules (following Government Code 2157.0611) as stated in the Administrator's COMAD decision because the statute does not apply to Donna ISD (and other Texas independent school districts).

As a result, in consideration of the Supplementary documentation presented herein, Donna ISD respectfully requests that the FCC grant our request for review and Order the Administrator to rescind the COMAD decisions.

Respectfully submitted this 12<sup>th</sup> day of January, 2012,



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# **ATTACHMENT 1**

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Federal Communications Commission  
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Donna Independent School District	)	
	)	
Schools and Libraries Universal Service	)	CC Docket No. 02-6
Support Mechanism	)	

**Request for Remand, Review or Waiver**

In accordance with Sections 54.719 through 54.721 of the Commission's Rules, now comes Donna Independent School District, Texas (Donna ISD) before the Federal Communications Commission (Commission) requesting remand to USAC, review or waiver of the Administrator's Decision on Appeal of a Commitment Adjustment (COMAD) by the Universal Service Administrative Company (Administrator). This request comes before the Commission in a timely manner from the Administrator's Decision on appeal dated June 15, 2011<sup>1</sup> and subsequent reply from USAC senior staff July 20, 2011<sup>2</sup>, refusing a request to self-initiate an appeal of their decision due to exceptional legal circumstances.<sup>3</sup>

Applicant Name: Donna Independent School District  
Billed Entity Number: 141639  
FCC RN:  
Service Provider: Integrity Communications  
SPIN: 143018592  
Funding Year: 2002  
Form 471 Application Numbers: 437252, 437253, 437255, 437256, and 437259  
Funding Request Numbers: 2125900, 1215901, 1215903, 1215904 and 1215911  
Funding Year: 2004  
Form 471 Application Numbers: 425434 and 425806  
Funding Request Numbers: 1176490 and 1177559  
Total Funds to be Recovered: \$5,606,563.94

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<sup>1</sup> Attachment 1 "Administrator's Decision on Appeal – Funding Year 2002-2003" June 15/16, 2011 (one of seven in all)

<sup>2</sup> Attachment 2 "Email from Leslie Frelow – SLD Director-Post Commitment Operations" July 20, 2011

<sup>3</sup> Attachment 3 "Email from Donna ISD to USAC Requesting Self-ID Review of Decision" June 30, 2011

## Reason for Commitment Adjustment:

During the course of an investigation of various Donna financial practices by the Texas Education Agency (TEA) June through August of 2006, culminating in a report issued July 10, 2007<sup>4</sup>, TEA cited a “concern” that Donna had not reached out for 3 bids from perspective service providers when requesting an Operational SPIN Change from USAC in September of 2005. TEA cited Texas State Government Code 2157.0611 as the legal basis for their determination. USAC quoted the TEA investigation “concern” as the basis of their decision to issue Commitment Adjustment Notification letters for all listed FRNs, stating in the seven COMAD letters, *“During an audit, it was determined that you did not comply with Texas State Government Code 2157.0611 that required the evaluation of three bids for purchases exceeding \$2,000, or documentation explaining why three bids could not be obtained. Since you failed to follow the applicable state procurement rules, the approved SPIN change is deemed invalid. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant.”*<sup>5</sup>

## Request for Remand

Donna ISD hereby respectfully requests, for reasons presented below, that the Commission remand Donna ISD’s original Appeal of the COMAD decisions listed above back to the Administrator and order that they hold any decision in abeyance until the Texas Attorney General issues its formal “Opinion” on the applicability of the Statute cited as reason for the “Concern” prior to issuing a Decision on the Appeal. Should the Texas Attorney General’s Opinion indicate that the Statute was not legally applicable to Donna ISD as a “local government entity” then the basis for the “concern” becomes invalid and the singular rationale USAC used for the COMAD also becomes immediately invalid.

Donna ISD also requests that, should the Texas Attorney General (Texas AG) rule that the statute cited by TEA was legally applicable to Donna ISD as a local government entity, Donna ISD be allowed the opportunity to provide further documentation and evidence to support a review and request for waiver with the Commission.

## Discussion

Donna ISD is an extremely low-wealth, socio-economically challenged school system comprised of approximately 15,000 students spread over 21 campuses, 14 elementary and 7 secondary, in extreme Southwestern Texas. Donna ISD has a strong need for technology resources and the District has applied for E-Rate funding support since the inception of the program. Donna ISD filed Form 471s timely and within program rules for the FY2002 and 2004 Priority 2 services in question. The FY2002 FRNs were not finally approved by the Administrator until May 24, 2005. Because of the time lag in approving FY2002 FRNs the original service provider was unwilling or unable to complete the project and the Donna ISD

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<sup>4</sup> Attachment 4: “Donna ISD - TEA Investigation Report – July 10, 2007”

<sup>5</sup> Attachment 5: “USAC Notification of Commitment Adjustment Letter” example of 7 in all Feb 10 & 16, 2011



Board approved a request for Operational SPIN Change for all the listed FRNs in July of 2005. Donna submitted the request for Operational SPIN Change in September 2005 following instructions provided by the Administrator and the Texas State E-rate Coordinator and the SPIN change was reviewed and approved by the Administrator.

Unrelated to the E-rate program, as a result of a complaint filed with the Texas Education Agency (TEA) by a disgruntled former Donna ISD senior staff member, in June through September 2006 TEA conducted an investigation of Donna ISD's overall financial practices and procedures. TEA provided Donna ISD with a report of the results of that investigation on July 10, 2007. TEA cited several "concerns" related to Donna ISD financial practices, one of which was related to the E-rate program. The "Concern" indicated that: "...the district did not provide evidence in the response that it had obtained three quotes for the multi-million dollar contracts awarded to Integrity Communications under E-Rate Cycle 5 Cycle 7 and Cycle 9 funding in accordance with Government Code § 2157.0611." It is important to note that there was *no penalty or punishment* associated with this finding or applied to Donna ISD at the time. Donna ISD was merely required to review the report with the Board and take appropriate corrective measures.

However, without prior awareness or communication, on February 10 and February 16, 2011, almost 4 years later, Donna ISD received Commitment Adjustment Notification Letters from the Administrator, requesting that a total of \$5,606,563.94 over 7 FRNs be returned to USAC, and giving the following as the rationale in each case:

"On your request for an operational SPIN change submitted on September 2, 2005 to USAC, you certified that the SPIN change requested was allowed under all applicable state and local procurement laws. During an audit, it was determined that you did not comply with Texas State Government Code 2157.0611 that required the evaluation of three bids for purchases exceeding \$2,000, or documentation explaining why three bids could not be obtained. Since you failed to follow the applicable state procurement rules, the approved SPIN change is deemed invalid. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant."

Donna ISD appealed the Administrator's decision after determining, through the opinion and sound legal advice of Donna ISD legal counsel, that the citation of Texas Government Statute §2157.0611 by the Texas Education Agency (TEA) as the founding element of "Concern 1" listed in their "Audit Findings Report" of July 10, 2007<sup>6</sup>, and utilized by USAC as grounds for the commitment adjustment decision, was *incorrectly determined* through an error in the application of Texas Statutory Code. Donna ISD has cause to believe that Texas Government Statute §2157.0611 does not, in fact of law, apply to "local government" entities such as school districts, thereby invalidating the TEA "Concern 1" as stated in their report.

As a result, Donna ISD has legally challenged the validity of the Audit "Concern" and has requested, through Texas Congressman Peter Gallego, Chairman of the House Committee on Criminal Jurisprudence, a formal opinion from the Texas Attorney General as to the applicability of State Statute §2157.0611 to "local government" entities such as Donna ISD.<sup>7</sup> We are

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<sup>6</sup> Ibid see Attachment 4: "Donna ISD TEA Audit Findings Report – July 10, 2007"

<sup>7</sup> Attachment 6: Letter to Office of Texas Attorney General entitled: "Re: Whether Texas Local Government Code §2157.0611 applies to school districts"

confident that the results of these actions will be a determination that TEA came to the negative finding in their “Concern 1” in error through misapplication of Texas Government Statutes and that TEA will ultimately report that Donna ISD did not violate state procurement rules when applying for the Operational SPIN change. TEA was clear in the July 10<sup>th</sup> report that Donna ISD followed state and local competitive bidding procedures when selecting original service providers for the FRNs.

Because the decision of the Texas AG’s Office is pivotal to the justification of the COMAD determination, Donna ISD, in our original Appeal to the Administrator, requested that USAC hold any decision on the Appeal and any action on the COMAD Letters listed above in abeyance while the legal request for opinion took its course and came to resolution through appropriate Texas statutory channels.<sup>8</sup>

The Administrator responded by requesting that Donna ISD provide the decision within 15 days or risk denial:

“Donna ISD has requested the formal opinions of the Texas Education Agency’s Director of Financial Audits and the Texas Attorney General in regards to the Texas Local Government Code §2157.0611. At the time you submitted the appeal, you did not provide the formal opinions from the two parties. Please provide the supporting documentation.”<sup>9</sup>

Donna ISD responded that we could not provide the formal opinions until they had been decided upon and that we were not able to control the length of time it took a formal process to proceed through the Texas legal system and again requested that they hold the decision on the Appeal until the Texas Attorney General issued their formal “Opinion.” On June 15, 2011, the Administrator, without further communication or warning, issued Appeal denial letters for all FRNs, citing the fact that “*you have failed to provide any evidence that USAC erred in its’ COMAD determination.*”<sup>10</sup> The Administrator completely ignored the fact that a legal challenge was in process, despite the fact that should the Texas AG opine that the statute was not legally applicable to Donna ISD as a local government entity, the basis for the TEA “concern” and the Administrator’s COMADs would become moot.

Donna ISD responded to the Administrator in an email July 13, 2011 requesting that they reconsider the Appeal Denial through a self-identified review and hold any Appeal decision until the Texas Attorney General issues its ruling. We included the letter from the Texas Attorney General’s Office outlining the legal process for “Opinion” procedures and providing a timeline for the decision. The Texas AG stated the Opinion would be issued “on or before December 24, 2011.”<sup>11</sup> The Administrator refused this request in a reply email July 20, 2011, stating: “*We are*

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<sup>8</sup> Attachment 7 – “Donna ISD Appeal of COMAD Decisions to USAC” April 5, 2011

<sup>9</sup> Attachment 8 – “Email from Administrator Requesting Information Regarding Appeal”

<sup>10</sup> Ibid – see Attachment 1 “Administrator’s Decision on Appeal – Funding Year 2002-2003” June 15, 2011 (one of seven in all)

<sup>11</sup> Attachment 9: “Letter from the Office of Texas Attorney General regarding Opinion Process and Timeline”

*unable to create a self-id appeal or review a new appeal concerning the same COMAD decisions.*"<sup>12</sup>

The Administrator waited almost four years after having access to the results of the TEA investigation (July 2007) to issue COMAD decisions on the FRNs, but refused to wait another 6 months after learning that the Texas AG was undergoing a formal review relating to the legal applicability of the evidence they used to deny the FRNs.

Because of the severity of the penalty involved in the COMAD, the loss of \$5.6 million, and the fact that the TEA has indicated that they impose *no penalty* on school districts that do not comply with the statute cited in their Concern 1, Donna ISD requests that we be given the opportunity, once the Texas AG Opinion is issued (and if it upholds the applicability of the Texas Statute), to provide additional information and rationale in request of a waiver of applicable rules used as grounds for the Administrator's COMAD decision, further developing the following salient points:

1. Donna ISD followed all rules and requirements it was aware of in requesting an Operational SPIN change for the FRNs in question, asking both USAC and the Texas E-rate Coordinator for proper instructions prior to filing the paperwork.
2. The SPIN change was reviewed and approved by the Administrator.
3. TEA and USAC indicated that the original contracts were procured following all FCC, USAC and state and local procurement rules.
4. The goods and services were critically needed to build the District technology network in support of student teaching and learning.
5. The E-rate "penalty" in this case – rescinding \$5.6 million in awards – far outweighs the apparent slight procurement violation (if it is found to be so) in this situation where the TEA considers the issue so minor that it imposes *no penalty* for violations.
6. The Texas Legislature amended Texas Education Code 44.031 (a) in June 2007, to remove government code 2157-0611 as a method to purchase goods or services.<sup>13</sup>
7. Donna ISD could have used any one of the various methods under TEC 44.031 (a) to select a new contractor.<sup>14</sup>
8. Donna ISD is in no financial position to be able to repay \$5.6 million to USAC and/or the FCC.

## **Conclusion**

Donna ISD hereby respectfully requests, for reasons presented above, that the Commission remand Donna ISD's original Appeal of the COMAD decisions back to the Administrator and order that they hold any decision in abeyance until the Texas Attorney General issues its formal "Opinion" on the applicability of the Statute cited as reason for the "Concern" prior to issuing a Decision on the Appeal.

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<sup>12</sup> Ibid – see Attachment 2 "Email from Leslie Frelow – SLD Director-Post Commitment Operations" July 20, 2011

<sup>13</sup> Attachment 10 – "History of HB 2918 (amendments to TEC 44 031(a))"

<sup>14</sup> Attachment 11 - "HB02918F (Amendments to TEC 44 031(a))"



Donna also respectfully requests that, should the Texas AG rule that the statute cited by TEA was legally applicable to Donna ISD as a local government entity, that Donna be allowed the opportunity, after delivery of the Texas AG Opinion, to provide further documentation and evidence to support a review and request for waiver of the Administrator's decision with the Commission.

Respectfully submitted this 12<sup>th</sup> day of August, 2011,

/s/

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## **ATTACHMENT 2**



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2011

The Honorable Pete P. Gallego  
Chair, Committee on Criminal Jurisprudence  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

Opinion No. GA-0900  
Re: Whether Government Code section  
2157.0611, concerning the procedure for making  
certain catalog purchases, applies to an  
independent school district  
(RQ-0980-GA)

Dear Representative Gallego:

You ask whether Government Code section 2157.0611, concerning the procedure for making certain catalog purchases, applies to an independent school district. <sup>(1)</sup>

Chapter 2157 concerns governmental purchasing of automated information systems and related items. Tex. Gov't Code Ann. §§ 2157.001-.184 (West 2008 & Supp. 2011). Subchapter B, which would include section 2157.0611, "appl[ies] only to a state agency to which Chapter 2054 [of the Government Code] applies." *Id.* § 2157.002 (West 2008). Chapter 2054 defines a "state agency" as "a department, commission, board, office, council, authority, or other agency in the executive or judicial branch of state government that is created by the constitution or a statute of this state, including a university system or institution of higher education." *Id.* § 2054.003(13) (West Supp. 2011). Furthermore, chapter 2054 includes a "school district" in its definition of "local government." *Id.* § 2054.003(9). Under these definitions, a school district is not a state agency subject to chapter 2054 and, therefore, section 2157.0611, to the extent it is currently effective, does not apply to an independent school district.

SUMMARY

The provision for catalog purchases in section 2157.0611 of the Government Code, to the extent that it is currently in effect, does not apply to purchases by an independent school district.

Very truly yours,

GREG ABBOTT  
Attorney General of Texas

Daniel T. Hodge  
First Assistant Attorney General

David J. Schenck  
Deputy Attorney General for Legal Counsel

Jason Boatright  
Chair, Opinion Committee

William A. Hill  
Assistant Attorney General, Opinion Committee

## Footnotes

1. See Letter from Honorable Pete P. Gallego, Chair, Committee on Criminal Jurisprudence, Texas

House of Representatives, to Honorable Greg Abbott, Attorney General of Texas at 1 (May 5, 2011), [https://www.oag.state.tx.us/opin/index\\_rq.shtml](https://www.oag.state.tx.us/opin/index_rq.shtml) ("Request Letter").

We note that the Eightieth Legislature repealed section 2157.0611 on May 22, 2007. Act of May 22, 2007, 80th Leg., R.S., ch. 1081, § 16, 2007 Tex. Gen. Laws 3703, 3707 ("House Bill 2918"). Five days later, the Legislature enacted a bill stating that it amends two sections of the Government Code pertaining to purchasing methods, one of which was section 2157.0611. Act of May 27, 2007, 80th Leg., R.S., ch. 1354, § 2, 2007 Tex. Gen. Laws 4643, 4643-44 ("House Bill 119"). West's Texas Codes Annotated indicates that section 2157.0611 is a repealed statute, but mentions House Bill 119 in its discussion of legislative history. See Tex. Gov't Code Ann. ch. 2157, subch. B historical note (West 2008) [Act of May 22, 2007, 80th Leg., R.S., ch. 1081, § 16, 2007 Tex. Gen. Laws 3703, 3707, *repealing* Government Code sections 2157.061 to 2157.063]. Without resolving the issue, we assume for purposes of this opinion that section 2157.0611 is currently in effect.

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